No. 12,145

IN THE

United States Court of Appeals

For the Ninth Circuit

W. M. (alias Bill) GILLIS,
(Plaintiff) Appellant,

vs.

BEN F. GILLETTE and IRENE GILLETTE,
(Defendants) Appellees.

BRIEF FOR APPELLANT.

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Subject Index

Table of Authorities Cited

Cases

Statutes

Texts

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STATEMENT DISCLOSING BASIS OF JURISDICTION.

48 U.S.C. Sec. 101, "There is established a District Court for the Territory of Alaska, with the jurisdiction of District Courts of the United States and with general jurisdiction in civil, criminal, equity and admiralty cases. * * *"

Compiled Laws of Alaska, 1933, Sec. 1994 (now CLA, 1949, Sec. 26-1-13),

> "Actions to enforce the liens created by this code shall be brought before the district court, * * *"

28 U.S.C. Sec. 1291,

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district

courts of the United States, The District Court for the Territory of Alaska, * * * except where a direct review may be had in the Supreme Court."

The complaint (Trans. pp. 2 and 3), the answer (Trans. p. 9) and the Findings of Fact (Trans. p. 20) all disclose that the property involved in this action for lien foreclosure is in Nome, Alaska.

STATEMENT OF THE CASE—QUESTIONS INVOLVED.

Appellant, W. M. (alias Bill) Gillis filed a lien on certain real property of the appellees, located in the Town of Nome, Alaska, and thereafter commenced this action to foreclose said lien under the provisions of Alaska statutes (Trans. p. 2 et seq.). Appellees answered and cross-complained (Trans. p. 9 et seq.) and Appellants made reply (Trans. p. 14 et seq.).

The case came on for hearing by the Court, without a jury, on the 26th day of December, 1947. The Court reserved decision until the 29th day of March, 1948, at which time a Memorandum of Findings and Conclusions was served upon both parties. Counsel for Appellees having died meanwhile, and counsel for Appellant having declined to make and file Findings of Fact and Conclusions of Law, the Court made and entered its Findings of Fact and Conclusions of Law and its Judgment on the 27th day of August, 1948. (Trans. p. 19 et seq.) Appellant then took this appeal.

The questions involved, as raised by Appellant's appeal and Assignment of Errors, are: (1) Whether the record and the Findings of Fact do not require Conclusions of Law and Judgment for plaintiff (Appellant); (2) Whether the record and the Findings of Fact do not require judgment foreclosing lien; or, (3) Whether further Findings of Fact are necessary to a complete decision on the questions involved.

SPECIFICATIONS OF ERROR RELIED ON BY APPELLANT.

1. The District Court erred in not concluding as a matter of law, that under the contract of labor between Appellant and Appellees, Appellant was entitled to judgment for the contract cost of labor ($2,872.28), minus the sum of $1,000.00 paid on account by Appellees, and minus the sum of the damages found owing to Appellees in the total amount of $817.25 (a net total of $1,055.03) in addition to the judgment for material furnished in the amount of $526.08, and in not granting judgment accordingly.

2. The District Court erred in not concluding as a matter of law, that Appellant was entitled to judgment for the sum of $1.95, the cost of filing his lien, and in not granting judgment accordingly.

3. The District Court erred in not concluding as a matter of law, that Appellant was entitled to judgment for a reasonable attorney's fee, in not designating said fee and in not entering judgment accordingly.

4. The District Court erred in not concluding as a matter of law that Appellant was entitled to judgment for costs, and in not entering judgment accordingly.

5. The District Court erred in not concluding as a matter of law that Appellant was entitled to judgment for interest at the rate of 6% per annum on the sum of $1,581.11 (labor bill of $1,055.03 plus cost of materials furnished $526.08) from the 16th day of December, 1946, until paid, and in not granting judgment accordingly.

6. The District Court erred in not concluding as a matter of law that Appellant was entitled to judgment of foreclosure against Appellees' property described as Lot Eight (8) and the North Twenty-two feet (N. 22′) of Lot Seven (7), Block "B", Nome, Alaska, for the unpaid balance of the contract cost of labor ($1,872.28), for the material furnished by Appellant outside the contract ($526.08) for the cost of filing Appellant's lien ($1.95) for a reasonable attorney's fee and for Appellant's costs, minus the damages allowed Appellees ($817.25), and in not granting judgment accordingly.

ARGUMENT OF THE CASE.

SUMMARY.

This appeal from the final judgment of the District Court in a lien foreclosure suit, was taken by Appellant on the contention that the Conclusions of Law

and Judgment entered are not the Conclusions of Law and Judgment required by the record and Findings of Fact in the Case.

The action for foreclosure of a Mechanic's Lien was brought under the provisions of Chapter XXXIX, Article I, Secs. 1982 through 1994 incl., and Article VIII, Secs. 2081, 2082 and 2083, Compiled Laws of the Territory of Alaska, 1933 (said laws now being found under Title 26 of Alaska Compiled Laws, 1949).

THE AMOUNT OF THE JUDGMENT.

Appellant brought this action for the reasonable worth of labor and material furnished (Complaint, Par. 1—Trans. pp. 1 and 2). Appellees answered and claimed a contract for a price certain of $2,872.28 (on which $1,000.00 is admitted to have been paid) with all materials to be furnished by Appellees. (Answer, Par. V—Trans. pp. 10 and 11). Appellees further made claim for eleven items of damages totalling $2,597.14, for Appellant's breach of contract (Answer, Par. VIII through Par. XVIII—Trans. pp. 12, 13 and 14) and prayed for judgment against Appellant for $724.86 (Trans. p. 14). This prayer for judgment was obviously the difference between the unpaid contract balance of $1,872.28 and Appellees' prayer for damages of $2,597.14.

Appellant by his Reply (Trans. pp. 14 through 19, incl.) admitted that the estimated labor cost was $2,872.28, and denied the claims for damages.

It is apparent from Appellant's Detailed Statement of Account (Trans. pp. 7, 8 and 9) and from the nature of the damages claimed by Appellees' Answer (Trans. pp. 12, 13 and 14) that the major portion of the work originally contemplated had been done prior to the time Appellant ceased work.

The Court found "That said basement and the moving operations were to be completed in October, 1946, at a cost of Two Thousand Eight Hundred Seventy-two and 28/100 ($2,872.28) Dollars. That all materials were to be furnished by the defendants. That defendants paid plaintiff on account the sum of One Thousand ($1,000.00) Dollars on October 10, 1946." (Findings of Fact—Trans. pp. 20 and 21.) The Court then proceeded to dispose of each of Appellees' claims for damages by finding that Appellees were entitled to certain damages for the completion of the basement, for the bracing of the building, for the filling in of the sump by Appellant, and for the failure of Appellant to complete the addition to the dwelling house, said damages being in the total sum of $817.25, and that Appellees were not entitled to the other damages claimed. (Findings of Fact, Par. V through XIV incl.—Trans. pp. 21, 22 and 23.) There is no finding by the Court as to what part, if any, of the damages incurred by Appellees were for the cost of materials which they had to use in completing the job.

It is significant to note that whether the problem is approached from Appellant's contention of the reasonable worth of the labor performed, of the value of $2,220.75 (Trans. p. 9), or from the contentions of

the Appellees as found by the Court that there was a contract for a price certain, and that Appellee is entitled to damages for the failure to complete the said contract, that substantially the same result is reached.

Appellant's Claim

Reasonable value of labor	$2,220.75
Less payment on account	1,000.00
	$1,220.75
Plus Cost of material	526.08
	$1,746.83

Court's Finding on Appellees' Claim

Contract price	$2,872.28
Less damages allowed	817.25
	$2,055.03
Less payment on account	1,000.00
	$1,055.03
Plus Cost of Material	526.08
	$1,581.11

The *Net Difference* is only $165.72.

It seems apparent that all or a portion of this small difference might well have been made up of the cost of materials used by Appellees in completing the work, the cost of which they would have had to have borne in any event. Appellant feels that the court erred in not making a specific finding on this point, but the error is not here urged.

While the record does not disclose a specific admission by Appellees of Appellant's claim for the unpaid

labor and material bill of $1,746.83, the affirmative plea contained in Paragraph V of the Answer (Trans. p. 11) "all materials were to be furnished by the defendants and for which the defendants promised and agreed to pay to the plaintiff the sum of $2,872.28", when coupled with Appellees' prayer for judgment for the difference between the unpaid balance of $1,872.28 and Appellees' claimed damages of $2,597.14 amounts to an admission by Appellees that there is due and owing Appellant the sum of $1,872.28 for labor on the contract, less only the damages allowed plaintiff.

Since the court followed the method contended for by Appellees of finding a contract and allowing damages for its breach, rather than following Appellant's claim for the value of only the work done, the conclusion is unescapable that under Appellees' answer and the findings of the court judgment should have been entered against Appellees, for the sum of $1,581.11.

RIGHT TO ATTORNEY'S FEES AND COSTS.

Compiled Laws of Alaska, 1933, Section 1119 (now CLA, 1949, sec. 26-1-13) reads in part as follows:

> "In all actions under this chapter the district court shall, upon entering judgment for the plaintiff, allow as a part of the costs all moneys paid for the filing and recording of the lien, also a reasonable amount as attorney's fees. * * *"

The mandatory phrasing of the statute evidences the attitude of the congress. The fee is not fixed and determined by the statute but is left to the court and is not penal in its nature but is in the nature of a cost to insure to the lien claimant payment for his labor and material without diminution by the costs of collection.

The principle and constitutionality of allowing attorney's fees in a lien foreclosure proceedings has been upheld by at least two cases in this court arising under the Alaska Law. *Cascaden v. Wimbish,* 161 F. 241, 88 CCA 277, and *Pioneer Mining Co. v. Delamotte,* 185 F. 752, 108 CCA 90.

RIGHT TO INTEREST.

Compiled Laws of Alaska, 1933, Sec. 1871, as amended by Laws 1935, Chap. 32, Sec. 1, p. 84 and Laws 1939, Chap. 31, Sec. 1, p. 106 (now CLA, 1949, Sec. 25-1-1) reads in part as follows:

> "The rate of interest in the Territory of Alaska shall be six per centum per annum, and no more, on all moneys after the same become due; * * *"

Upon the cessation of the work here involved, the money therefor became due Appellant. It has been held, in *New York Alaska Gold Dredging Co. v. Walbridge,* 38 F. (2d) 199, that interest at the legal rate ran from the time it became due, and was not qualified by a later clause referring to judgments and decrees. That if a judgment is entered it is for money which became due at the time the cause of action arose.

The principles of and necessity for allowing interest is well set out in that case wherein they quote at length from *Curtis v. Innerarity,* 6 How. (47 U.S.) 146, 154, 12 L. Ed. 380 on the necessity of allowing interest to compensate for money wrongfully withheld.

THE RIGHT TO A FORECLOSURE OF LIEN.

A good general statement of the traditional, and correct, attitude of the courts toward mechanics' liens is found in Vol. 33 Am. Jur. 423, paragraph 8, Policy of law as to liens:

> "Both policy and morality require that liens, whether by contract of the parties or by operation of law, should be sustained whenever it is possible without violation of positive law, inasmuch as they are of too sacred a character to be divested or even impaired by vague and uncertain implications. However, the lien which the law favors is the specific or particular lien. * * *"

The Alaskan law, which was adopted from Oregon Law, is of comprehensive scope. Compiled Laws of Alaska, 1933, Sec. 1982 (now CLA, 1949, Sec. 26-1-1) reads as follows:

> "Persons Entitled to Lien for Work or Labor Done or Material Furnished. Every mechanic, artisan, machinist, contractor, lumber merchant, laborer, teamster, drayman and other person performing labor upon or furnishing material of any kind to be used in the construction, alteration or repair, either in whole or in part, of any building, wharf, bridge, flume, fence, machinery or

aqueduct, or any structure or superstructure, shall have a lien upon the same for the work or labor done or material furnished at the instance of the owner of the building or other improvement or his agent."

In the case of *Arctic Lumber Co. v. Borden,* 211 Fed. 50, the court quotes the opinion of Judge Sanborn in *Hooven, Owens & Rentschler Co. v. John Featherstone Sons,* 111 Fed. 81, 49 C.C.A. 229 as follows:

"Labor and material once bestowed lose all their value to the laborer or materialman. He cannot take them back. They enhance the value of the property upon which they are placed, and its owner and those who take under him receive all the benefits of the labor and material. In such circumstances the lien of the laborer or materialman should be maintained to the full extent to which the statute gives it."

Further authority for a liberal construction of lien law, arising out of Alaska, is to be found in *Russell v. Hayner,* 130 Fed. 90 where it was said

"The act relating to mechanics' liens should be liberally construed. The evident spirit and purpose of the act is to do substantial justice to all the parties who may be affected by its provisions, and the courts should avoid unfriendly strictness and mere technicality. (Citing cases.) But in following this rule courts should always be careful not to impair the force of the statute or fritter away its meaning by construction. * * *"

The District Court found that Appellant continued his work on the house until December 15, 1946, and

that on March 14, 1947 the claim was filed in the office of the recorder of the Cape Nome Precinct, Second Division, Territory of Alaska. (Trans. p. 21.) This is equivalent to a finding that requirements of Alaska law requiring the filing of a claim of lien within 90 days of cessation of labor in the recorder's office in the Precinct and Division where the work was performed had been met. The applicable law is found in Compiled Laws of the Territory of Alaska, 1933, Sec. 1987 as amended by C.L.A. 1943, Chapter 21 (now C.L.A., 1949, Sec. 26-1-5):

> "Lien Claim: Time and place of filing: Contents: It shall be the duty of every original contractor, after the completion of his contract, and of every mechanic, artisan, machinist, builder, lumber merchant, laborer, or other person, claiming the benefit of this article, within ninety days after the completion of his contract or the alteration or repair thereof, or after he has ceased to labor thereon from any cause, or after he has ceased to furnish materials therefor, to file with the recorder of the precinct in which such building or other improvement, or some part thereof, shall be situated, a claim containing a true statement of his demand, after deducting all just credits and offsets, with the name of the owner or reputed owner, if known, and also the name of the person by whom he was employed or to whom he furnished the materials, and also a description of the property to be charged with the lien sufficient for identification, which claim shall be verified by the oath of himself or of some other person having knowledge of the facts."

SUFFICIENCY OF THE FINDINGS OF FACT.

Compiled Laws of the Territory of Alaska, 1933, Sec. 3870 as Amended Laws 1937, Chap. 44, Sec. 1, p. 113 (now CLA, 1949, 55-8-2) reads:

> "Findings and Conclusions by Court: Proceedings: Reference. All issues of fact in actions of an equitable nature may be tried by the Court, the evidence shall be presented and the trial conducted in the same manner as other actions; provided, the Court may, in its discretion, refer the case to a referee pursuant to the provisions of this title. In all such actions the Court, in rendering its decisions therein, shall set out in writing its findings of fact upon all material issues of fact presented by the pleadings, together with its conclusions of law thereon; but such findings of fact and conclusions of law shall be separate from the judgment and shall be filed with the clerk, and shall be incorporated in and form a part of, the judgment roll of the case; and such findings of fact shall be subject to review by the appellate tribunal, and may be amended to conform to the evidence. Exceptions may be taken during the trial to the ruling of the Court, and also to its findings of fact, and a statement of such exceptions prepared and settled as in an action and within the same time."

From Compiled Laws of Alaska, 1933, page 715, chapter LXXXII, "Issues and Trial", Section 3544:

> "When Issue of Law and Fact Arise, Issue of Law to be First Tried. Issues both of law and of fact may arise upon different parts of the pleadings in the same action. In such cases the issues

of law shall be first tried, unless the court otherwise directs".

American Jurisprudence, Volume 53, page 788, section 1134—Matters Required to be Found:

"With respect to the matters upon which a Court trying a case without a jury must make findings, the general rule is that while the Court is not required to make findings on immaterial issues, it *must make findings on every material issue presented by the pleadings and supported by the evidence*".

American Jurisprudence, Volume 53, page 794, paragraph 1139:

"findings of fact by the trial court should be definite and certain, and in such form as to dispose of material issues, and not negative in such form as not to dispose of the matter. A finding must be sufficient in itself without inferences or comparisons or balancing of testimony or weight of evidence."

American Jurisprudence, Volume 19, reading from section 408, at page 280, "Pleadings and Proof as Basis of Decree":

"According to the general rule, a decree must be responsive to, or in conformity with the pleadings and the proof which has been adduced in support thereof; otherwise, it may be held to be invalid and ineffectual and may be treated as a nullity even in a collateral proceeding".

American Jurisprudence, Volume 19, page 280, footnote 16:

> "A decree granting relief must be based either on the bill and the admissions of the answer or on the bill and the proof sustaining the cause made in the bill. A decree cannot be based on allegations without pertinent proof or on proof without corresponding allegations. The relief granted must always be in conformity with the case made in the pleadings and established by the proof, and relief cannot be granted that is at variance with either".

However there is authority that where the findings do not fully meet the requirement of the statute, they may nevertheless contain enough to enable the Appellate Court to dispose of the appeal. *Roberts v. Date,* 123 Fed. 238, 59 C.C.A. 242.

And in *Dalton v. Hazelet,* 182 Fed. 561, 105 C.C.A. 99, the court said at 182 Fed. p. 570:

> "The absence of a proper bill of exceptions leaves the case open for consideration upon the pleadings, findings of fact, conclusions of law, and decree under which the substantial merits of the case will be determined."

The foregoing appears to Appellant to leave this Court but two alternatives: (A) Remand the case for further proceedings and the entry of findings in compliance with the statute, or (B) take the record containing the pleadings, findings of fact, conclusions of law, and judgment, consider the case and grant Appellant judgment for the sum of $1,581.11, allow him a reasonable attorney's fee and his costs, and enter a judgment of foreclosure against the property of the Appellees hereinbefore described.

It is Appellant's view that there is no basis in the record, at any point, for denying Appellant judgment for his labor bill. As has been pointed out, there is in Appellees' pleadings, an admission of a contract. The positive Findings of Fact denying Appellee his claimed damages, except to the extent of $817.25, leave the record without basis for denying Appellant recovery, either on his claim for the reasonable value of labor, or on the contract for labor.

Likewise, while the record is not as clear as might be desired on Appellant's right to his lien, nor as to his compliance with all statutory and technical requirements, Appellant finds nothing in the record from which it can be said positively that the lien has been lost or destroyed.

Dated, Nome, Alaska,
April 27, 1949.

Respectfully submitted,
C. C. TANNER,
Attorney for Appellant.